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Supreme Court, U.S.
FILED

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IN THE SUPREME COURT OF THE UNITED STATES

JENNIE STABILE, as Trustee of the Stabile Family Trust Agreement Dated May 1, 1990, (JENNIE STABILE, an individual, successor-in-interest) and CREATIVE DEVELOPMENT, INC., a Nevada corporation,

Petitioners,

vs.

CALIFORNIA FEDERAL BANK, a federal savings bank, Does 1 through 100 and all persons unknown, claiming any legal or equitable right, title, estate, lien or interest in the property described in the Complaint adverse to Plaintiffs' title, or any cloud upon plaintiffs' title thereto

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE CALIFORNIA COURT OF APPEAL AND
THE CALIFORNIA SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

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45pp

QUESTIONS PRESENTED FOR REVIEW

I - Interpretation of Garn-St. Germain Act and related federal statutes:

A due-on-sale clause in a real estate mortgage or trust deed generally allows a lender to accelerate the note and thus requires the borrower to pay his mortgage immediately, rather than over a period of years. The Garn-St. Germain Act, particularly 12 USC 1701j-3(b)(1), preempted the power of state legislatures and courts to limit the enforceability of such clauses.

However, a companion federal statute, 12 USC 1701j-3(b)(2), allows the parties themselves, by the wording of their contract, to determine which events, if any, will permit such acceleration. Thus, although state law cannot limit the effect of a due-on-sale clause, the parties can decide (i) to structure their loan contract to have no due-on-sale clause at all, or, (ii) if the contract is to contain a due-on-sale clause, what events will lead to a right of the lender to accelerate.

The due-on-sale clause in the contract at issue is substantially similar to that appearing in loan forms used nationally by such financing agencies as the Federal National Mortgage Association ("Fannie Mae") and the Federal Home Loan Mortgage Corporation ("Freddie Mac"), which some courts have interpreted to contain wording narrowing the scope of the due-on-sale clause. In addition, the present contract contains further limiting wording which is less frequently found in the national contract forms.

The Supreme Court has neither interpreted the wording found in the national contract

forms, nor set standards for interpreting such additional limiting wording as appears here.

In the present instance, the borrower deeded the property to her alter ego corporation, of which she was the only shareholder, and then reversed that transaction two weeks later via a deed returning the property to her individual name. The lender unilaterally exercised its option to exercise its due-on-sale clause, and conducted a nonjudicial foreclosure based entirely on those deeds.

Question 1:

Under such circumstances, was the due on sale clause validly invoked to accelerate the loan and foreclose?

Question 2:

Even if the deed by this borrower would, arguendo, if not reversed, have been an event justifying exercise of the due-on-sale clause, did not rescission of the deed prior to any steps by the lender to accelerate cure any violation of the due-on-sale clause?

II - Bankruptcy preemption of "ipso facto" clause in loan contract:

The loan contract contained a clause stating that the filing of bankruptcy by the borrower would, ipso facto, be an event of default, allowing acceleration of the note and foreclosure. The lender had obtained relief from the automatic stay, under 11 USC 362(d) prior to initiating foreclosure proceedings; however, the subject property remained property of the bankruptcy estate at all times during the foreclosure process and until the foreclosure

sale occurred and the foreclosure trustee's deed was recorded.

Question 3:

Does the bankruptcy code preempt and ineffectuate a contractual provision stating that the borrower's filing of a bankruptcy is an event of default, allowing the lender to accelerate the note, at least until the subject property is no longer property of the estate?

III - Due process

The California trial court and the California Court of Appeal both ruled that, to maintain an action to set aside a foreclosure, the borrower must first tender the full amount of the loan, even if there was no default permitting the lender to accelerate the note and declare the entire loan due immediately.

Question 4:

May a court to refuse to hear an action to set aside a nonjudicial foreclosure on the merits without tender of the full amount of the loan where, if the borrower-plaintiff's contentions are correct, the entire loan was not due?

See generally, Societe Internationale v. Rogers, 357 U.S. 197,209 (1958)(there are constitutional limitations on the power of courts to dismiss an action without a hearing on the merits); Logan v. Zimmerman Brush, 455 U.S. 422,428 (1982) (a cause of action is a species of property protected by the Due Process Clause of the Fourteenth Amendment).

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List of Parties and of Corporate Affiliates of Petitioner

A list of parties is in the caption of the case. The petitioner is not a corporation, so no list of affiliates is required.

Citations of Opinions and Orders Entered in the Case

None.

Basis for this Court's Jurisdiction

(i) The order of which review is herein sought was filed in the California Court of Appeal on September 4, 1998.

(ii) The California Court of Appeal filed an order denying rehearing on October 5, 1998.

The California Supreme Court filed an order denying review on November 24, 1998.

(iii) Not applicable.

(iv) The decision at issue is reviewable by this Court under 28 USC 1257(a).

(v) Does not appear to apply.

Constitutional Provisions, Statutes and Court Rules Involved in the Case

United States Constitutional Provisions

Fourteenth Amendment, Section 1

Any persons born or naturalized in the United States, and subject to jurisdiction thereof, are citizens of the United States and

of the State in which they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Statutes of the United States

11 USC Section 541(c)(1)

"[With irrelevant exceptions], an interest of the debtor in property becomes property of the estate ... notwithstanding any provision in an agreement, transfer instrument or applicable nonbankruptcy law --

...

(B) that is conditioned on the insolvency or financial condition of the debtor, on the commencement of a case under this title, or on the appointment of or taking possession by a trustee in a case under this title or a custodian before such commencement and that effects or gives an option to effect a forfeiture, modification, or termination of the debtor's interest in property.

12 USC Section 1701j-3

Section 1701j-3. Preemption of due-on-sale prohibitions

(a) Definitions. For the purpose of this section -

(1) the term "due-on-sale clause" means a contract provision which authorizes a lender, at

its option, to declare due and payable sums secured by the lender's security instrument if all or any part of the property, or an interest therein, securing the real property loan is sold or transferred without the lender's prior written consent;

(2) the term "lender" means a person or government agency making a real property loan or any assignee or transferee, in whole or in part, of such a person or agency;

(3) the term "real property loan" means a loan, mortgage, advance, or credit sale secured by a lien on real property, the stock allocated to a dwelling unit in a cooperative housing corporation, or a residential manufactured home, whether real or personal property; and

(4)[Irrelevant]

(5) the term "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the Northern Mariana Islands, American Samoa, and the Trust Territory of the Pacific Islands.

(b) Loan contract and terms governing execution or enforcement of due-on-sale options and rights and remedies of lenders and borrowers; assumptions of loan rates.

(1) Notwithstanding any provision of the constitution or laws (including the judicial decisions) of any State to the contrary, a lender may, subject to subsection (c) of this section, enter into or enforce a contract containing a due- on-sale clause with respect to a real property loan.

(2) Except as otherwise provided in subsection (d) of this section, the exercise by the lender of its option pursuant to such a clause shall be exclusively governed by the terms of the loan contract, and all rights and remedies of the lender and the borrower shall be fixed and governed by the contract.

(3) [Irrelevant]

(c) [Irrelevant]

(d) [Irrelevant]

(e) Rules, regulations, and interpretations; future income bearing loans subject to due-on-sale options.

(1) The Federal Home Loan Bank Board, in consultation with the Comptroller of the Currency and the National Credit Union Administration Board, is authorized to issue rules and regulations and to publish interpretations governing the implementation of this section.

(2) Notwithstanding the provisions of subsection (d) of this section, the rules and regulations prescribed under this section may permit a lender to exercise its option pursuant to a due-on-sale clause with respect to a real property loan and any related agreement pursuant to which a borrower obtains the right to receive future income.

(f) [Irrelevant]

(g) [Irrelevant]

Statement of the Case

Petitioner Plaintiff-Appellant JENNIE STABILE, as Trustee of the Stabile Family Trust Agreement dated May 1, 1990 ("Stabile", the "Stabile Trust"), was Trustor of the subject real property, commonly known as 7308 DeSoto Ave., Los Angeles, California ("DeSoto"), and more particularly described as:

> "Lot 7 of Tract No. 6778 in the City of Los Angeles, County of Los Angeles, State of California, as per map recorded in Book 93, pages 53 and 54 of Maps, in the Office of the County Recorder of said county",

under a deed of trust to Defendant-Appellee CALIFORNIA FEDERAL BANK ("Calfed", "Calfed's T.D."). Calfed's T.D. was recorded in the Office of the County Recorder of Los Angeles County (the "County Recorder") on January 22, 1992. Stabile was also obligor under a promissory note secured by Calfed's T.D.

[Stabile's trusteeship of the Stabile Trust, and the existence of a trustee of the deed of trust should not be confused; the trustee of a California deed of trust is, in essence, a ministerial agent of the lender and here was a party entirely unrelated to Stabile.]

Although it does not appear explicitly on the record, the net cash flow generated by DeSoto was, at all relevant times, until Calfed's procurement of a receiver, the primary income source of the elderly Stabile. (Stabile had been past chairperson of the Housing Finance Committee of the National Association of Realtors).

The Stabile Trust was dissolved by order of the United States Bankruptcy Court for the Central District of California on December 6, 1995, leaving Stabile in her capacity as an individual as successor plaintiff-appellant in the action.

Plaintiff-Appellant CREATIVE DEVELOPMENT, INC. ("Creative") was a Nevada corporation, entirely owned and controlled by Jennie Stabile, and was, in all respects relevant to this Petition, at all relevant times, an alter ego of Jennie Stabile. Creative was a transferee of the Subject Property under a deed from Stabile dated February 11, 1994. Creative returned the Subject Property to Stabile by a duly acknowledged deed on February 25, 1994. The validity of the latter deed was never questioned in the proceedings below.

It has also been unquestioned that Jennie Stabile, during and after the transfer to Creative, remained in full operating and financial control of the Subject Property, and that, under California law, Stabile's liability under the note secured by Calfed's T.D. was unaffected by the transfer.

Jennie Stabile, as an individual, filed a voluntary Chapter 11 bankruptcy petition on December 28, 1994. In the remainder of this petition for review, Jennie Stabile in her capacity as an individual, the Jennie Stabile bankruptcy estate, and Jennie Stabile in her capacity as trustee of the Stabile Trust are all referred to as "Stabile" unless the distinction is not obvious and would be of significance.

Subsequently, Creative filed a voluntary Chapter 11 petition on February 3, 1995, which bankruptcy was then consolidated with Stabile's.

The filing of these petitions imposed, under 11 USC 362, an automatic stay against any effort by Calfed to, inter alia, enforce the Calfed T.D. or note against the property, until Calfed obtained relief from the automatic stay on June 22, 1995. Calfed procured appointment of a receiver over DeSoto on June 29, 1995.

Twenty days after the receivership appointment, Calfed, on or about July 19, 1995, recorded a "Notice of Default and Election to Sell Under Deed of Trust" ("NOD") in the Office of the County Recorder. The NOD listed only one ground of default: failure to pay the full amount of the note, which Calfed had exercised its claimed option to accelerate under the due-on-sale clause contained in Calfed's T.D. The acceleration was nominally based upon the purportedly unauthorized deeding of title to the DeSoto property to Creative.

On or about October 24, 1995, Calfed recorded a "Notice of Trustee's Sale" (the "NOTS"). On or about December 29, 1995, Calfed conducted a nonjudicial foreclosure sale; the Trustee's Deed ("Trustee's Deed") was recorded on or about January 4, 1996. The Trustee's Sale was a shock to Stabile, who had understood that her prior attorneys had arrived at a standstill agreement involving Calfed and a subordinate lender.

Through their action underlying this petition (First Amended Verified Complaint filed March 7, 1996), Plaintiffs-Appellants sought to cancel the Trustee's Deed, quiet ownership of title to the Subject Property in favor of Stabile, and obtain damages.

After Plaintiffs voluntarily dismissed their first cause of action, for breach of

"verbal" contract, the Superior Court of California (the state trial court), Hon. Judge Arthur Baldonado, sustained Calfed's demurrers to the remaining causes of action without leave to amend. Appeal to the California Court of Appeal followed.

Since there was no court reporter present at the hearing on the demurrers, nor did the parties settle an agreed statement, the proceedings in the Court of Appeal were based "on the judgment roll".

Prior to the Court of Appeal's determination of the appeal in this action, 2d Civ B104661, that Court had ruled in a companion appeal, 2d Civ B 103902, that, at the time of appointment of the receiver, Stabile had been in default on her loan contract. The Court of Appeal hearing this matter ruled that determination of the prior Court of Appeal panel precluded relitigation of the fact that at least one default had existed at the time of the receivership appointment. However, although Calfed had alleged various defaults, the trial court, in the receivership case, clearly had not specified the precise default(s) <u>determined</u> to have existed when the receiver was appointed.

Since some classes of defaults allow acceleration of the note (here requiring immediate payment of more than $1,500,000.), while others merely require the loan or property taxes to be brought current (here an amount under $100,000), there is a qualitative economic distinction among the various types of defaults.

The proceeding here at bar is an appeal of the trial court's orders sustaining Calfed's demurrers and judgment dismissing the action. The Court of Appeal, in its unpublished opinion

filed September 4, 1998 affirmed the trial court's judgments in their entirety. A Petition for Rehearing in the Court of Appeal was denied by order filed October 5, 1998. A Petition for Review by the California Supreme Court was denied on November 24, 1998.

Reasons Relied on for Allowance of the Writ

This petition meets criteria for Certiorari under Supreme Court Rules 10(b) and 10(c).

1. Due-on-Sale Claims:

1. Application of Garn-St. Germain Act to Due-on-Sale Clauses in Trust Deeds:

While recognizing the general federal preemption of due-on-sale clauses, based upon 12 USC 1701j-3(b)(1), the Court of Appeal neglected the contractual exception to applicability of such clauses, established by another section of the same statute, 12 USC 1701j-3(b)(2). This contractual exception applies in this instance. Appellants will demonstrate that: (i) an exception to a due-on-sale clause, based on the particular clause not encompassing within its purview the type of transaction which actually occurred, statutorily overrides, in that instance, a generalized assertion of a default claiming a prohibited transfer; (ii) contrary to the Court of Appeal's Opinion, the contract at issue did not draw a bright line which rendered all possible transfers subject to the clause; and (iii), the transaction which actually occurred was not a transfer within the contemplation of the subject loan contract.

a. Does the Garn-St. Germain Act require that, prior to enforcement of a contractually limited due-on-sale clause, a

transfer within the scope of that clause must first occur?

A due-on-sale clause in a real estate loan agreement is, under federal law, to be interpreted in accordance with the terms of the contract. 12 USC 1701j-3(b)(2). The preemption precludes or invalidates any state law purportedly limiting the effect of such clauses; however, the federal statute, by its terms, allows the parties to contract in such a manner that the due-on-sale clause is limited with respect to the range of circumstances under which it can be applied.

" ... [T]he exercise by the lender of its option pursuant to such a clause shall be exclusively governed by the terms of the loan contract, and all rights and remedies of the lender and the borrower shall be fixed and governed by the contract". 12 USC 1701j-3(b)(2).

This wording has been uniformly interpreted to mean that the exercise of the clause is subject to the limitations imposed by the contract, as interpreted under the law applicable to the contract. Here, the contract is to be "governed by and construed and enforced in accordance with" federal banking laws (see Para. 39 of Deed of Trust, Para. 11 of Note (Choice of Law)); however, the laws of California apply to issues not covered by federal banking laws, including, to the extent not preempted, contractual interpretation.

The wording of 12 USC 1701j-3(b)(2) does not preempt state law interpretation of the contract. The Supreme Court, in Fidelity Federal Savings v. De La Cuesta, 458 U.S. 141 (1983), interpreted the equivalent, for this purpose, wording of 12 CFR 545.8-3(f), as it existed in

1982:

"Exercise by the association of such option (hereafter called a due-on-sale clause) shall be exclusively governed by the terms of the loan contract, and all rights and remedies of the association and borrower shall be fixed and governed by that contract".

In response to De La Cuesta's contention that state contract law was incorporated by this sentence, the Supreme Court implicitly agreed, noting, however, that the applicability of state law did not "signify the inapplicability of federal law". De La Cuesta at 156-7. The Supreme Court, in the ensuing discussion, effectively indicated that, although state contract law applied, it did not apply to the extent that it was preempted by federal law. [Thus, in that case, California's Wellenkamp decision was held to be preempted]. Accordingly, although a state may not make a law prohibiting the enforcement of a due-on-sale clause if such clause exists in a contract, the parties may, by their contract, opt to include or exclude a due-on-sale clause, and, if included, specify under what circumstances the due-on-sale clause may be enforced. De La Cuesta at 157-8.

Accordingly, although a due-on-sale clause cannot be limited by state law, it can be limited by the terms of the contract. As a consequence, a due-on-sale clause cannot be mindlessly applied or enforced, but must be interpreted in the context of the applicable laws of contractual interpretation. See also Morse v. City Federal Savings & Loan Association, 567 F.Supp. 699,702 (S.D.Fla. 1983)(in order to exercise a contractual right to accelerate, "the lender must first have obtained such contractual right"). Like any

other contractual term, a due-on-sale clause must be construed against the drafter (here, Calfed). Morse at 703 (applying Florida law). While Morse applied Florida law, the same result would obtain under California law. California Civil Code ("CC") Section 1654.

Where conditions precedent to exercise of a due-on-sale clause are neither mandated by state law nor conflict with federal regulations, they are merely a type of private contractual limitation referred to and expressly sanctioned by the federal regulation. Morse, Id. Morse was interpreting the same regulation as De La Cuesta, which, as noted, was worded virtually identically to the current statute, 12 USC 1701j-3(b)(2).

An example helps to illuminate this argument. If the due-on-sale clause at issue had been drafted to preclude only a transfer to a foreign trust, no other transfer would fall within the scope of that clause regardless of the federal preemption.

b. Can contractual wording which a lender includes in its deed of trust effectively waive the lender's protections under Garn-St. Germain?

Although state law may not limit the exercise of due-on-sale clauses to circumstances which impair the lender's security, the parties may do so by the terms of their contract. O'Boskey v. First Federal Savings & Loan Assn. 678 P.2d 1112, 106 Ida. 339 (1984)(due-on-sale clause contained in section of loan contract introduced by words "To protect the security of this Deed of Trust grantor agrees ..." indicates contractual agreement to limit exercise to situations involving impairment of security).

Here, in addition to virtually identical introductory wording at page 3 of the Deed of Trust, "TO PROTECT THE SECURITY OF THIS DEED OF TRUST TRUSTOR AGREES AS FOLLOWS:", preceding the numbered paragraphs including Paragraph 16 containing the due-on-sale clause, the due-on-sale clause, Paragraph 16 itself, commences with the following introductory wording:

" ... By delivery of this Deed of Trust, Trustor acknowledges that the financial standing and managerial and operational ability of Trustor are substantial and material considerations to Beneficiary in its agreement to make the loan evidence[d] by the Note and that any encumbrance or transfer of an interest in the Property will materially impair Beneficiary's reasonable security hereunder. ..."

These words should not be treated as irrelevant surplusage, but as a material part of the due-on-sale provision. Accordingly, no reasonable reading of the loan contract, and of Paragraph 16 in particular, especially in view of the stated general purpose of the numbered paragraphs, "TO PROTECT THE SECURITY OF THE DEED OF TRUST ... ", can imply any purpose for the due-on-sale clause other than protection of Calfed against impairment of its security. Any other conclusion would be an absurdity.

For all practical purposes, Calfed, in drafting Paragraph 16, effectively waived, at least for transfers of the kind that occurred here, the protection of Garn-St. Germain.

c. Where the borrower "transfers" property to a corporation which is his alter ego, and language of the due-on-sale clause specifically states a purpose for that clause

which implies that such a "transfer" was not contemplated to be within its purview, can the lender nevertheless enforce the due-on-sale clause with respect to that "transfer"?

Here, where Stabile, after the "transfer" to Creative, retained liability for the debt, and continued, as the "alter ego" of the corporation, to operate the property, it does not require much analysis to recognize that Calfed continued to enjoy the benefit of Stabile's "financial standing" and "managerial and operation ability", and, therefore, the purpose of the due-on-sale clause was not violated.

d. Assuming that a borrower makes a deed which is, arguendo, violative of a due-on-sale clause enforceable under Garn-St. Germain, but subsequently rescinds the deed, reversing the transaction, prior to initiation of any foreclosure, and with no prejudice to the lender, does Garn-St. Germain nevertheless allow the lender to proceed with a foreclosure based on the initial due-on-sale violation.

Here, even if Stabile's initial deed to Creative violated Calfed's due-on-sale clause, the transaction was rescinded with the return deed. Subsequently, Calfed, apparently overzealous to deprive Stabile of her property, initiated a foreclosure based on the deed to Creative, notwithstanding that the transaction, when coupled with the rescinding deed, was a nullity, was entirely harmless to Calfed and was a transfer only in form but not in substance.

If Garn-St. Germain had been inapplicable to such a transaction, principles of pre-Garn-St. Germain California law, such as Wellenkamp v. Bank of America (1978), 21 Cal.3d 943 (lender

can exercise a due-on-sale clause only where transfer impairs its security), would have precluded Calfed's exercise of its due-on-sale clause.

The Garn-St. Germain issue was raised repeatedly, and was the focal point at all stages of the action. For example, the Garn-St. Germain statutes were discussed in the accompanying opinion of the California Court of Appeal, at pages 4-7, and in Stabile's Petition for Review to the California Supreme Court at pages 5-8.

Certiorari should be granted on this issue, based on the conflict between the California Court of Appeal's opinion, and those of the Idaho Supreme Court in O'Boskey, supra, Supreme Court Rule 10(b), and, to the extent relevant, the tension between the California Court of Appeal's opinion and that of this Court in De La Cuesta, supra, Supreme Court Rule 10(c).

2. Bankruptcy "ipso facto" issue:

c. Does federal bankruptcy law preempt and void an ipso facto clause in a loan contract, such as that contained in the loan documents at bench, which defines the mere filing of a bankruptcy petition as an event of default? 11 USC 541(c)(1)(B), coupled with the Supremacy Clause, is dispositive of the validity of contractual provisions which purport to establish the filing of bankruptcy as an event of default. 11 USC 541(c) reads, in relevant part, as follows:

> "[With irrelevant exceptions], an interest of the debtor in property becomes property of the estate ... notwithstanding any provision in an

agreement, transfer instrument, or applicable nonbankruptcy law --

...

(B) that is conditioned on the insolvency or financial condition of the debtor, on the commencement of a case under this title, or on the appointment of or taking possession by a trustee in a case under this title or a custodian before such commencement, and that effects or gives an option to effect a forfeiture, modification, or termination of the debtor's interest in property".

541(c)(1)(B) has been interpreted to mean that such clauses are void with respect to property owned by a bankruptcy estate. See generally, In re Cutler, 165 B.R. 275,278 (Bkrtcy. D.Az. 1994) (bankruptcy estate owned partnership interest free and clear of any contractual transfer restrictions conditioned on bankruptcy filing). Therefore, the bankruptcy default clause did not apply to the subject property, and Stabile, as Debtor-in-possession, held the Subject Property clear of any default based on the trust deed's bankruptcy clause.

Although Calfed had obtained relief from stay to foreclose on the property, until foreclosure, the property remained property of the estate, and subject to the bankruptcy code, and the right of the debtor to include the property in her Chapter 11 plan. For example, although Calfed had stay relief, any other creditor wishing to foreclose (e.g., a subordinate lienholder) would have, separately, been required to obtain its own relief from

stay. The stay relief granted to Calfed merely permitted Calfed to proceed with its state law remedies with respect to any defaults that contractually existed and were not otherwise barred. Since the Stabile bankruptcy estate held the property clear of the bankruptcy default, the bankruptcy default could not be a basis for foreclosure, and, if otherwise complying with the terms of the deed of trust, Stabile could have and undoubtedly would have included the Subject Property in her Chapter 11 plan.

Certiorari should be granted on this issue, since it involves important questions of federal law which have not been, but should be decided by this Court. Supreme Court Rule 10(c).

3. Due process issues:

This Court has routinely held that a cause of action is a species of property protected by the Due Process Clause. Logan v. Zimmerman Brush, 455 U.S. 428 (1982); Richards v. Jefferson County, 517 U.S. 793,804 (1996); Tulsa Professional Collection Services v. Pope, 485 U.S. 478,485 (1988). Accordingly, it cannot be deprived without appropriate procedure, or arbitrarily, by the state. Stated succinctly, there are constitutional [due process] limitations on the power of a court to dismiss an action without a hearing on the merits. Societe Internationale v. Rogers, 357 U.S. 197,209 (1958).

A. Consideration of the question below:

The issue of validity of the requirement of full payment of the loan to proceed with the action arose in the trial court, and was discussed at all stages of the action. Particularly, the question of whether, even if

such a requirement were applicable, the full amount of the loan or merely any purportedly delinquent payments should be tendered was mentioned in the Petition for Review to the California Supreme Court at page 14, and earlier in the trial court and at the Court of Appeal level. While the words "due process" were not mentioned in raising the issue, Stabile was obviously attacking the reasonableness of the requirement of full payment of her mortgage where only a small amount, if any, was actually delinquent.

This Court has discretion to consider arguments, and even issues that were not raised below. Cohen v. Cowles Media Corp., 501 U.S. 663 (1991) ("It is irrelevant to this Court's jurisdiction whether a party raised below and argued a federal law issue that the state supreme court actually considered and decided").

Illinois v. Gates, 462 U.S. 213 (1983), while not reflecting the apparently more recently moderated policy with respect to consideration of arguments not specifically raised below, as expressed in Cohen, supra, nevertheless discusses the reasons for the "not pressed or passed upon" rule.

First, the record is likely to be inadequate with respect to issues not raised below. Gates at 221. That is not the case here, since the substantive issue, i.e., the question of what, if any tender requirement should be applied, was thoroughly discussed at all court levels.

Second, state courts should be given an opportunity to consider and pass upon the constitutionality of the acts of state officials. Gates at 221. However, here, no state

officials, other than the judges of the state courts hearing the action, were involved.

Finally, a state court should be allowed to rest its decision, even in the instance of a constitutional issue, on a state law ground. Gates at 222. Here, of course, the state courts did so, since the substantive question of whether and to what extent the loan should be required to be paid prior to proceeding with the action was thoroughly explored at all stages.

Accordingly, the reasons for the "not pressed or passed upon" rule are entirely inapplicable to the due process issue in this Petition. This Court thus has jurisdiction and a sound basis for considering the due process question.

B. Substantive discussion of the Question:

Here, the Court ruled that, even if Stabile had a meritorious case, California law did not allow a cause of action to set aside a foreclosure to proceed without the entire loan being paid, whether or not it would have been due had the plaintiff-borrower's contentions been valid.

The Court of Appeal ruled that "in order for an action to set aside a trustee's sale to proceed, the plaintiff must pay, or offer to pay, the debt before he commences his action or his complaint". Court of Appeal Opinion at page 9. Assuming the Court of Appeal ruling to accurately reflect California law, that requirement, as applied to the present case, was arbitrary and unreasonable.

Stabile's action claimed that her acts did not violate the due-on-sale clause; and

consequently, the notice of default, relying only on the purported due-on-sale violation, failed to state any actual default at all. The state courts, however, took the position that, notwithstanding the possible validity of Stabile's due-on-sale contentions, it had previously been decided, in the related receivership action, that some default had existed, at least at the time of appointment of the receiver.

Assuming, arguendo, that one or more of the claimed defaults existed at the time of appointment of the receiver, it does not necessarily follow that the entire loan amount was due at the later time of filing of the notice of default. Not every default allows full acceleration of the entire loan, without an opportunity to pay a lesser amount, possibly a few monthly payments, or a year's property taxes, to cure the default.

The claimed defaults, aside from the due-on-sale claim, were the bankruptcy "ipso facto" default, discussed supra, a claimed "receivership" default, arising from appointment of a receiver, and various payment defaults.

The "ipso facto" bankruptcy default claim was invalid due to its conflict with applicable bankruptcy law, as discussed supra. The receivership claim was irrelevant on its face; the notice of default was filed twenty days after the appointment of the receiver (NOD filed July 19, 1995; receiver appointed June 29, 1995), but appointment of a receiver did not become a default until forty-five days after the appointment (see Calfed's T.D. at page 1, "Definitions", paragraph (4)(4e)).

The only remaining defaults were of the

minor monetary classes; a few claimed late payments and a moderate amount of property taxes – possibly $50,000-$75,000 in total defaults as opposed to the more than $1,500,000. which the Court demanded be paid to proceed with the action.

Certainly, the demand for such a huge payment to proceed with the causes of action to invalidate the foreclosure was sufficiently unreasonable, arbitrary and capricious as to be violative of due process. Since the California Court of Appeal's opinion indicated that such a requirement reflected the state of California law, and not merely an error of a trial judge, this Court should grant Certiorari. Supreme Court Rule 10(c).

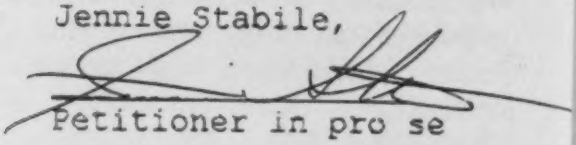
Conclusion

Based on the above discussion, Certiorari should be granted to address the division among the state courts with respect to the Garn-St. Germain issues, to resolve important issues of federal law and to reverse decisions clearly conflicting with prior opinions of this Court.

Notwithstanding that none of the employees involved in the foreclosure against Stabile remains employed by Calfed, review is urged to discourage flagrantly unethical lender behavior against the elderly, as occurred here.

February 22, 1999 Respectfully submitted,

Jennie Stabile,



Petitioner in pro se

APPENDIX

Entered May 6, 1996

Date: 05/06/96 DEPT. 19

Honorable ARTHUR BALDONADO Judge

J.L. Rendon Deputy Clerk

W. Fernandez Asst. Clerk

C. Edwards/CSL Deputy Sheriff

None Reporter

BC 145324

JENNIE STABILE ET AL
VS
CALIFORNIA FEDERAL BANK ET AL

NATURE OF PROCEEDINGS:

DEMURRER OF DEFENDANT CALIFORNIA FEDERAL BANK TO FIRST AMENDED COMPLAINT
MOTION OF DEFENDANT ABOVE, FOR ATTORNEYS' FEES AND COSTS AS PREVAILING PARTY ON EXPUNGEMENT MOTION;

On the above matters heretofore taken under submission on May 2, 1996, the Court rules as follows:

Demurrer as to the 2nd through 5th causes of action sustained without leave to amend. Grounds stated. Although the notice of default only makes reference to an unauthorized transfer, plaintiff was in default under the terms of the deed of trust by filing petitions in bankruptcy. (see exhibit B to the first amended complaint; see; also exhibit 3 to moving papers) As plaintiff was in default due to the aforementioned bankruptcy petitions and failed to make viable tender of payment of the indebtedness owing she is precluded from proceeding with this action. (See Karlsen v. American Saving & Loan Association (1971) 15 Cal App 3d 112,117)

Motion for attorneys' fees granted, $12,584.00 and $417.20 in costs.

Moving party is to give notice.

A copy of this minute order is sent via U.S. Mail to counsel addressed as follows:

MANATT, PHELPS & PHILLIPS
DENNIS B. FRANKS, ESQ.
11355 W. OLYMPIC BLVD.
LOS ANGELES, CA. 90064

ALBERSTONE & EVANGELOS
DALE S. ALBERSTONE, ESQ.
1801 AVENUE OF THE STARS, STE. 810
LOS ANGELES, CA 90067

MINUTES ENTERES
05/06/96
COUNTY CLERK

Filed May 17, 1996

MANATT, PHELPS & PHILLIPS, LLP
DENNIS B. FRANKS (State Bar No. 112624)
SETH GOLD (State Bar No. 163220)
11355 West Olympic Boulevard
Los Angeles, California 90064
Telephone: (310) 312-4000

Attorneys for Defendant
CALIFORNIA FEDERAL BANK,
a Federal Savings Bank

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

Case No. 145324

JENNIE STABILE, as Trustee of the Stabile Family Trust Agreement dated May 1, 1990 and CREATIVE DEVELOPMENT, INC., a Nevada corporation,

Plaintiffs.

vs.

CALIFORNIA FEDERAL BANK, a federal savings bank, Does 1 through 100 and all persons uhnknown, claiming any legal or equitable right, title, estate, lien or interest in the proeprty described in the complaint adverse to Plaintiffs' title, or any cloud upon plaintiffs' title thereto,

Defendants.

JUDGMENT OF DISMISSAL FOLLOWING SUSTAINING OF DEMURRER WITHOUT LEAVE TO AMEND
[CCP Para. 581(f)(1)]

I/C JUDGE ARTHUR BALDONADO

Pursuant to the Court's order of May 67, 1996, sustaining without leave to amend defendant California Federal Bank's ("Defendant") demurrers to the First Amended Complaint of plaintiffs

Jennie Stabile, as trustee, and Creative Development, Inc. ("Plaintiffs") and ordering that Defendant be awarded attorneys' fees in the amount of $12,584.00 and costs in the amount of $417.20, and good cause appearing,

IT IS ORDERED, ADJUDGED, AND DECREED that the First Amended Complaint of Plaintiffs be dismissed with prejudice as to Defendant and that judgment be entered in favor of Defendant; and,

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that Defendant shall recover from Plaintiffs, jointly and severally, a total of $12,584.00 in fees and of $417.00 in costs.

DATED: 5/17, 1996

Signature
Judge Arthur Baldonado

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

FILED SEPTEMBER 4, 1998

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

JENNIE STABILE, etc., et al.,	B104661
Plaintiffs and Appellants	(Super. Ct. No. BC 145324)
V.	
CALIFORNIA FEDERAL BANK,	
Defendant and Respondent	

Appeal from a judgment of the Superior Court of Los Angeles County, Arthur Baldonado, Judge. Affirmed.

Michael H. Lapidus, Inc. and Michael H. Lapidus for Plaintiffs and Appellants.

Manatt, Phelps & Phillips, LLP, and Dennis B. Franks for Defendant and Respondent

FACTS AND PROCEDURAL HISTORY

Appellant Jennie Stabile owned an apartment complex located at 7308 DeSoto Avenue in Canoga Park, California (the DeSoto property). California Federal Bank (CalFed) lent $1,750,000 to Stabile as the trustee of the Stabile Family Trust. In return, Stabile provided CalFed with a promissory note, secured with a deed of trust to the DeSoto property (Deed of Trust).

The Deed of Trust contained provisions to protect CalFed in the event of default. Circumstances giving rise to an event of default include, in pertinent part (1) filing of a petition for voluntary bankruptcy; (2) a transfer of the property without prior written consent; (3) trustor's failure to make any payment when due; (4) appointment of a trustee or receiver for the property. Upon the occurrence of an event of default, the Deed of Trust provided that the beneficiary had the discretion to commence judicial foreclosure proceedings, conduct a trustee's foreclosure sale of the DeSoto property, and declare the obligations of the trustor to be immediately due and payable.

In February of 1994, Stabile transferred her entire interest in the DeSoto property by grant deed to Creative Development, Inc. (Creative), a Nevada corporation controlled and owned solely by Stabile. Although the Deed of Trust specifically provided that prior written consent was necessary for the transfer of property, the transfer was made without CalFed's knowledge or consent. [1] Subsequently, on December 28, 1994, Stabile voluntarily filed for personal bankruptcy under Chapter 11 of the Bankruptcy Code. On February 3,1995, Creative filed a voluntary petition under Chapter 11 of the Bankruptcy Code.

---

1. This court elects to take judicial notice under Evidence Code section 452, subdivision (d), of the Court of Appeal's opinion in California Federal Bank v. Stabile (Jun. 17, 1997) B103902, which involved the same parties and the DeSoto property.

The bankruptcy court granted CalFed's motion for relief from the automatic bankruptcy stay that was preventing it from exercising it deed, and authorized CalFed to conduct an immediate sale of the DeSoto property. Thereafter, CalFed recorded a notice of default and election to sell under the Deed of Trust and noticed a trustee's sale of the DeSoto property.

The Deed of Trust required that Stabile pay all the tases on the property, however, she failed to do so. As of June 1995, the property was subject to a tax lien of $45,921.44 in unpaid taxes. Further, Stabile failed to make the June 1, 1995 payment of principal and interest due under the note.

On December 23, 1995, CalFed held a trustee's sale of the DeSoto property, during which CalFed purchased the property for $1,188,157.45, leaving $602,568.04 as the outstanding debt owed on the note.

CalFed had also filed a complaint for judicial foreclosure, specific performance, and appointment of a receiver. Soon thereafter, a receiver was appointed to collect the rents and other income produced by the DeSoto property. The receiver filed a motion to approve the receiver's final report and account, exonerate bonds and disburse funds. The superior court granted the receiver's final account motion and ordered that the balance of the rents collected in the receivership estate ($21,865.63) be disbursed to CalFed. The Court of Appeal issued its ruling affirming the decision of the trial court. In its decision the court noted that "[t]he Receivership Order also necessarily determined that Stabile was in default under the Deed of Trust. In order for the trial court to have appointed a receiver, a finding of default under the terms of the Deed of Trust necessarily had to be made."

Stabile filed this subsequent suit in superior court against CalFed, alleging five causes of action: (1) breach of oral contract, (2) breach of written contract, (3) cancellation of the trustee's deed, (4) an action to quiet title, and (5)

accounting. Stabile dismissed the first cause of action. The trial court sustained the demurrer as to the remaining causes of action without leave to amend. The court held that although the notice of default only makes reference to an unauthorized transfer, Stabile was in default under the terms of the Deed of Trust by filing petitions in bankruptcy. Further, the court found that as Stabile was in default due to the bankruptcy, and her failure to make viable tender of payment of the indebtedness she owed precluded her from proceeding with this action.

Stabile appeals the actions of the trial court contending: (1) CalFed had no valid basis to exercise its due-on-sale clause; (2) a default not stated within the notice of default cannot be retroactively invoked to justify foreclosure; (3) no tender was required to proceed with the action; and (4) the court must presume that Stabile complied with the written contract because it is stated within the pleadings. We find Stabile's arguments without merit and affirm the judgment of the trial court.

DISCUSSION

I Standard of Review

We must review a ;trial court's sustaining of a demurrer without leave to amend for an abuse of discretion. (Hendy v. Losse (1991) 54 Cal.3d 723,742.) Although we will assume the truth of all properly pleaded facts, we will not assume the truth of contentino, deductions or conclusions of fact or law, and we may disregard allegations that are contrary to facts of which we may take judicial notice. (Moore v. Regents of University of California (1990) 51 Cal.3d 120,125.) "'[T]he allegations ... [are to] be liberally construed with a view to attaining substantial justice among the parties.'" (King v. Central Bank (1977) 18 Cal.3d 840,843.)

II Calfed Had Valid Basis to Exercise Its Due-on-Sale Clause

Stabile argues that the transfer of the DeSoto property from herself to Creative was not a "transfer" under the language of the Deed of Trust. Further, she contends that even if the transfer was effective, it was "cured" by a subsequent transfer of the DeSoto property from Creative back to Stabile, thereby rectifying a potential violation of the due-on-sale clause. Stabile concludes that the transfer was not an event of default, and therefore, CalFed breached the Deed of Trust by foreclosing.

Turning to the pleaded facts, Stabile admitted that she "executed a Grant Deed ... from Stabile to [Creative] which purported to convey Stabile's entire interest in the Property to [Creative]." Stabile acknowledged that she was the exclusive owner of Creative, and that "[a]t all times since October 15, 1992, [Creative] was and is the alter ego of Stabile in that at all times there existed such a unity of interest and ownership between Stabile and [Creative] that no separation of the two existed."

Stabile 's assertion that the Deed of Trust did not contemplate a transfer of the nature which occurred between herself and Creative is erroneous. Stabile's reliance on California case law regarding similar transfers under due-on-sale clauses is not controlling because of subsequent federal legislation, 12 United States Code section 1701j-3. Enacted as part of the Garn-St. Germain Depository Institution Act of 1982, section 1701j-3(b)(1) provides: "Notwithstanding any provision of the constitution or laws (including the judicial decisions) of any State to the contrary, a lender may, subject to subsection (c) of this section, enter into or enforce a contract containing a due-on-sale clause with respect to a real property loan." Contrary to Stabile's assertions, this section takes the governance of the due-on-sale clauses out of the purview of the states. "The provisions of the Garn Act preempt all state statutes and judicial decisions which restrict the enforcement of 'due on sale' clauses in real property loans. Thus, it supersedes any judicial

decisions in California that are inconsistent with the provisions of the Act." (4 Miller & Starr, Current Law of California Real Estate (2d ed. 1989) Deeds of Trusts and Mortgages, Para. 9:87, p. 261)

Section 1701j-3(b)(2) provides that "the exercise by the lender of its option pursuant to such a clause shall be exclusively governed by the terms of the loan contract, and all rights and remedies of the lender and the borrower shall be fixed and governed by the contract." In accordance with the section, we look to the Deed of Trust to determine CalFed's proper exercise of the clause. Deed of Trust paragraph 16.1 provides that "any encumbrance or transfer of an interest in the Property will materially impair ;Beneficiary's reasonable security hereunder." The paragraph provides further that "Upon any Transfer or further encumbrance made in violation of Paragraph 16, Beneficiary shall have the absolute right in its sole discretion, without demand or notice, to declare all sums, indebtedness and obligations secured thereby to be immediately due and payable." By using the language "any" to refer to the transfer, the "execution of an option ... to buy probably would also permit the beneficiary to exercise his option to accelerate." (4 Miller & Starr, Current Law of California Real Estate, supra, Para 9:86, p.256.) Further, because the Deed of Trust purported to cover "any" transfer, we find that it intended to include the transfer at issue. As Miller & Starr explained, "the words 'transfer of any interest in the liened property' would include a disguised transfer" if the loan documents provide for acceleration. (Id. At p. 265, italics added.)

In addition to Stabile's failure to prove that the transfer was outside of the contemplation of the contract, Stabile is collaterally estopped from, arguing that she was not in default under the Deed of trust. In the prior appeal involving these same parties and the DeSoto property (California Federal Bank v. Stabile, supra), Stabile, as trustee of the Stabile Family Trust, appealed from an order approving the receiver's final report and account and dispersing net rent proceeds to CalFed,

the beneficiary under the Deed of Trust, following a trustee's sale of the property. In that prior case, Stabile contested the preclusive effect of the receivership proceeding's determination that she was in default under the Deed of trust. The Court of Appeal found that the receivership order "necessarily determined that Stabile was in default under the Deed of Trust. In order for the trial court to have appointed a receiver, a finding of default under the terms of the Deed of Trust necessarily had to be made." This prior appellate opinion held that the receivership order was a final judgment which collaterally estopped Stabile from relitigating, in that prior appeal, the issue of her default under the Deed of Trust. Likewise, Stabile is estopped by our prior opinion from relitigating, in the present appeal, the issue of her default. (Buttimer v. Alexis (1983) 146 Cal.App.3d 754,768.

Stabile further claims her default was "cured" by a subsequent transfer from Creative back to Stabile. This argument also is without merit. Although Stabile is correct in asserting that some defaults may be cured, her own does not fall under that category.

There are two categories of trustor obligations: those which are curable, which include the failure to pay installment notes and taxes; and those which are incurable, which include the failure to make improvements on the property and a failure to comply with applicable laws. "[T]he sale, transfer or further encumbrance of the property" is a noncurable default. (4 Miller & Starr, Current Lw of California Real Estate, supra, Para. 9:124, p. 393.) The beneficiary's right to accelerate exists to protect it from actions by the trustor which may injure the security of the loan obligation. (Id. At p. 394.) Therefore, Stabile's assertions that she "cured" the default of DeSoto property's transfer are without merit. Stabile's subsequent attempts to retransfer the property were of no consequence to this suit.

When Stabile defaulted on her obligation re2uired by the Deed of trust, CalFed had the right

to declare a default and proceed with foreclosure of the Deed of Trust pursuant to the private power of sale. Specifically, Deed of Trust paragraph 21.1 included rights and remedies if Stabile defaulted on her obligations. "At any time after the occurrence of an Event of Default Beneficiary and/or Trustee shall have the following rights and remedies: ... [t]o commence and maintain an action or actions in any Court of competent jurisdiction to foreclose this Deed of trust as a mortgage."

Therefore, we find that the trial court properly decided that Stabile defaulted upon her loan obligations, and further that Stabile did not have a cause of action against CalFed for breaching the Deed of Trust by foreclosing upon the DeSoto property.

III A Notice of Default

California statutes set forth clear and specific methods of proceeding wiht an action to foreclose. The foreclosure process under the private power of sale is commenced by the recordation of a notice of default and election to sell. The form and required contents of the notice of default are specified by statute. Under Civil Code section 2924, a notice of default must set forth "the nature of each breach actually known to the beneficiary and of his or her election to sell or cause to be sold the property to satisfy that obligation." The statutory requirements are intended to protect the trustor from a wrongful or unfair loss of the property; therefore, they demand strict compliance.

Stabile notes that this language of Civil Code section 2924 has been interpreted to mean that a beneficiary cannot foreclose based upon a breach not specified in the notice of default. We agree. In Miller v. Cote (1982) 127 Cal.App.3d 888,894, the notice of default was defective because there was no default when the notice of default was filed. In that case, th;e court found that appellants were "bound by their notice of default; they could not assert any ground of default other than that stated in the notice." (Ibid.)

Stabile correctly observes that CalFed did not include bankruptcy nor the receivership action within the notice of default; accordingly, CalFed was bound by its notice of default. However, as already noted in our prior opinion, of which we have taken judicial notice, Stabile is estopped from contesting the lack of a valid default of the Deed of Trust. Therefore, Stabile is precluded from attacking CalFed as to the specifics in its notice of default.

IV. Stabile Failed to Provide the Court with Tender

Stabile contends that the notice of default was materially defective and therefore void. Accordingly, she argues that the foreclosure sale was not only voidable, but also void ab ititio; therefore, no tender was required.

The third cause of action to cancel the trustee's deed upon sale and the fourth cause of action to quiet title both are raised by Stabile as challenges CalFed's acquisition to the title of the DeSoto property. However, in order for an action to set aside a trustee's sale to proceed, the plaintiff must pay, or offer to pay, the debt before he commences his action or his complaint. (Karlsen v. American Sav. & Loan Assn. (1971) 15 Cal.App.3d 112,117: "A valid and viable tender of payment of the indebtedness owing is essential to an action to cancel a voidable sale under a deed of trust.") Further, the California Supreme Court has held that "'it is apparent from the general tenor of the decisions that an action to set aside the sale, unaccompanied by an offer to redeem, would not state a cause of action which a court of equity would recognize.'" (Copsey v. Sacramento Bank (1901) 133 Cal. 659,662.) Absent a payment of this debt, or even an offer, Stabile has failed to comply with the rules to state a cause of action.

V. This Court May Take Judicial Notice of Facts Outside the Pleadings to Contradict the Pleadings

Stabile contends that this court must presume

paragraph 25 of the complaint which states "Plaintiffs performed all the covenants, terms and conditions on their part to be performed under the Written Contract." Stabile notes that paragraph 7 of the complaint defines written contract as comprising both CalFed's Deed of Trust and the promissory note.

However, throughout her entire argument, Stabile ignores the ability of this court to take judicial notice of evidence outside the pleadings. Stabile contends that she has "performed" according to the contract, though it has been previously determined that she defaulted upon her loan obligations for failure to perform. Therefore, we find Stabile's argument, premised on a fact which has already been found to be untrue in a prior case, is unavailing.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

BOREN
BOREM. P.J.

We concur:

FUKUTO
FUKUTO, J.

NOTT
NOTT, J.

FILED NOVEMBER 24, 1998

Second Appellate District, Division Two,
No. B104661

S074157

IN THE SUPREME COURT OF CALIFORNIA

JENNIE STABILE, As Trustee, Etc. Et Al., Appellants

V.

CALIFORNIA FEDERAL BANK, Respondent

Appellants' petition for review DENIED.

GEORGE
Chief Justice